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No. 88-1438

In The

Supreme Court of the United States

October Term, 1988

CHARLSA SCHWARTZ, et al.,

Petitioners,

v.

JOHN DEERE COMPANY and
DEERE & COMPANY,

Respondents.

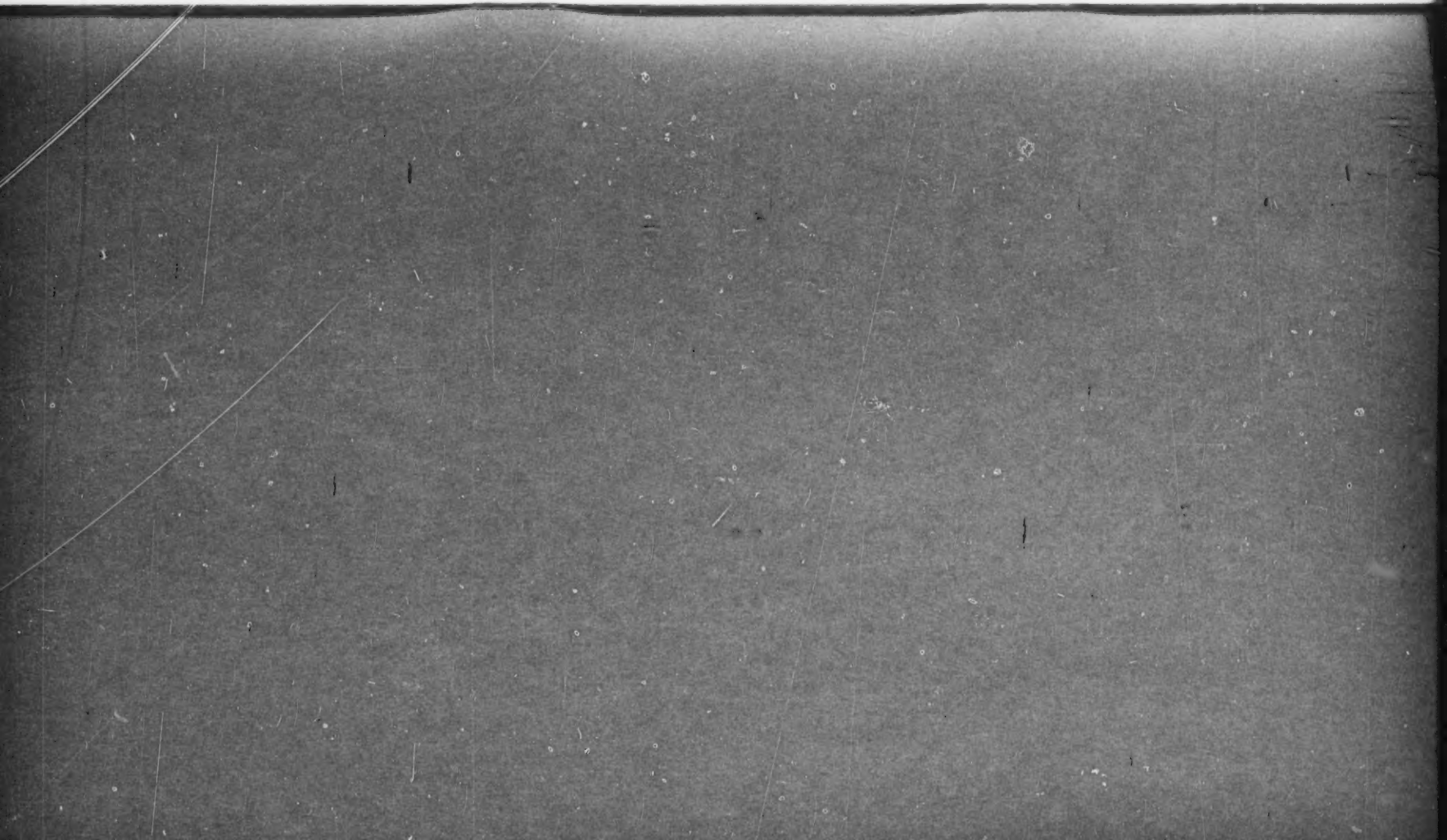
On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Court of Appeals evaluate Petitioners' economist's testimony consistently with the law of other circuits?

2. Did the Court of Appeals correctly conclude that Petitioners' economic testimony was unsupported by record fact and provided no basis for the jury's award?

3. Do Petitioners' attacks on the lower courts' decisions raise a credible Seventh Amendment argument?

4. Did the District Court properly grant judgment notwithstanding the verdict because the evidence did not support an award of exemplary damages under Texas law?

5. Did the Court of Appeals act within its discretion in remanding for a new trial of both pecuniary and nonpecuniary damages?

LIST OF PARTIES

1. Charlsa Schwartz Stuckey, Individually and as Administratrix of the Estate of Harold Joe Schwartz, Jr.
2. Aimee Schwartz
3. Amanda Schwartz
4. John Deere Company

   The parent company of John Deere Company is Deere & Company.
5. Deere & Company

   Subsidiaries and affiliates, other than wholly-owned subsidiaries, of Deere & Company:

   Amerequip Corporation

   Bunton Company

   Deere Hitachi Construction Machinery Corporation

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

Respondents respectfully request that the petition for writ of certiorari be denied.

STATEMENT OF THE CASE

A. The Cause of Action

On October 5, 1980, Joe Schwartz, Jr. became entangled in the intake machinery of a John Deere cornhead and combine, and died as a result of his injuries.

Although there were no eyewitnesses to the accident, Tr. 79, Petitioners' testifying engineer believed that the machine had clogged with cornstalks, Tr. 160, that Mr. Schwartz had been attempting to manually unclog the machine, and that the cornstalk had come free and pulled Mr. Schwartz into the machinery.

Petitioners filed a wrongful death and survivorship suit against Respondents John Deere Company and Deere & Company (collectively "Deere") in the United States District Court for the Northern District of Texas, Dallas Division, based on diversity of citizenship. Petitioners asserted that Deere was liable for Mr. Schwartz's death under Texas strict tort liability theories of defective design and inadequate warning. They also sued for exemplary damages under the Texas case of *Burk Royalty Co. v. Walls*, 616 S.W.2d 911 (Tex. 1981), which requires a finding that a defendant "was consciously, i.e., knowingly, indifferent to [plaintiff's] rights, welfare and safety." *Id.* at 922.

B. The Evidence

As Petitioners state, Petition at 3, Deere was aware that the products involved in the accident were dangerous to users who attempted to manually unclog them. Deere never disputed this at trial. *See, e.g.*, Tr. 91, lines 22-24. In fact, it was uncontested that Deere had labeled the machinery with several warnings specifically instructing users not to attempt to unclog the machine while it was running. Tr. 154-56.

Petitioners' Statement of the Case incorrectly suggests that Deere knew not only that its combine was

dangerous, but also that it had an available safety device that it deliberately chose not to use. Deere was in fact the owner of the patent to an automatic cutoff switch used on lawnmowers and garden tractors. Petitioners' statement that such a switch "would eliminate the snap roll hazard", though, refers only to the opinion of Petitioners' testifying engineer, John Sevart, and not to any admission by Deere. No evidence was introduced that *Deere* believed that a cutoff switch would be effective to prevent accidents on combines as well as garden equipment.

Similarly, Petitioners' inflammatory comment that Deere "chose not to provide protection for farmers", Petition at 3, is groundless. There is no evidence in the record that Deere believed it had not provided farmers with protection; that Deere thought a cutoff switch would provide additional protection; or that Deere deliberately decided not to use a cutoff switch for combines.[1] Petitioners called no present or former Deere employees to

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[1] The proposition that a safety device used on garden tools will be equally effective for farm equipment is far from self-evident. Farmers might have considered cutoff switches so burdensome that they would manually disable them, thus rendering them ineffective. Plaintiffs' engineer agreed that if a safety feature was "such a nuisance as to lead the user to defeat it, [it] is not a safety feature at all and in all probability may reduce safety." Tr. 162.

The lack of evidence that Deere knew or believed that a cutoff switch would be effective to prevent combine accidents, or that it made any conscious decision not to place a safety device on the combine, is critical to the lower courts' disposition of Petitioners' claims for exemplary damages under Texas law.

testify about Deere's knowledge or decision processes. All that appears in the record is that the involved combine did not have a cutoff switch.

Petitioners' "evidence" of damages from the loss of Mr. Schwartz's pecuniary support consisted almost entirely of the testimony of economist Everett Dillman. Dr. Dillman, in concluding that Mr. Schwartz would have provided $1,525,000 in future earnings to his family,[2] expressly stated that the only fact in the record on which he was relying was Mr. Schwartz's master's degree in farming. Tr. 239. Dr. Dillman then simply multiplied Mr. Schwartz's future life expectancy, as predicted by standard statistical tables, by the average wages earned by all male Americans with five or more years of college – including doctors, lawyers, and M.B.A.'s – as reflected in other statistical tables. Tr. 219-20, 239.

Dr. Dillman deliberately chose to ignore Mr. Schwartz's earnings history, which showed that Mr. Schwartz had lost money in each of the three years preceding the accident, including a loss of $202,633 in just the first nine months of 1980. Tr. 230-31. Mr. Schwartz had never netted more than $15,000 per year from farming. Tr. 229-31. Nevertheless, based only on his statistical tables, Dillman ventured that Mr. Schwartz would have provided his family with over $29,000 in support in 1981, and would have enjoyed steady and constant increases in income for the next thirty years. Tr. 235-36. Although Dillman readily admitted that Mr. Schwartz would not have achieved these remarkable earnings had he remained a farmer, Tr.

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[2] Dillman also testified that the value of Schwartz's future household services was $70,000.

235, there was no evidence in the record that Mr. Schwartz was planning to change jobs.[3]

C. The Verdict and Disposition

The jury found that although Deere had provided adequate warnings, the farm machinery was defectively designed. The jury also found that Joe Schwartz's negligence was a 30% contributing cause of his death. Petitioners were awarded pecuniary loss damages totalling $1,650,000, a figure nearly identical to that proposed by their economist. The jury awarded nonpecuniary damages of $1,100,000, which included a $100,000 survivorship award to Mr. Schwartz's estate. Finally, the jury found that Deere had acted with "conscious indifference" and awarded $1,500,000 in punitive damages. *See* Petitioners' Appendix, H-10 to H-13.

Deere timely moved for a new trial or judgment non obstante veredicto. R. 268-80. The district court granted Deere's motion for J.N.O.V. as to the jury's finding of conscious indifference, stating: "There was simply no

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[3] Charlsa Schwartz Stuckey testified that the Schwartzes had never specifically decided to change professions, and that they wanted to stay in farming "as long as [they] could." Tr. 291. There was no evidence presented of how long the Schwartzes "could" have continued to farm, nor any evidence of specifically what they would have done had they stopped farming. The undisputed evidence was that Mr. Schwartz was trained and educated to be a farmer and that was all he had ever done in his life. Tr. 304. Three years prior to his death the Schwartzes purchased their own farm and Mrs. Stuckey admitted that it was her husband's intention "to make it as a farmer." Tr. 306.

evidence of any acts or omissions by Deere that could reasonably give rise to an inference that Deere was consciously indifferent to the rights and safety of people in the field." Petitioners' Appendix, B-4. The court set aside the $1.5 million exemplary damage award, reduced all remaining damages by 30% in accordance with the comparative fault finding, and entered judgment for Petitioners in the principal sum of $1,925,000.

Deere appealed to the Court of Appeals for the Fifth Circuit, principally attacking the pecuniary-loss award as unsupported by the record and the nonpecuniary-loss award as excessive in part. Petitioners cross-appealed from the J.N.O.V. denying them exemplary damages.

The Court of Appeals affirmed the jury's finding of liability, the $100,000 award for survivorship damages, and the district court's denial of punitive damages. It reversed the pecuniary loss award, finding that Petitioners' economic evidence was so lacking that "[a]ll the jury could do was guess." Petitioners' Appendix, A-6. The court, finding that there was likely to be confusion among jurors if pecuniary damages were tried separately, vacated the nonpecuniary award as well and remanded for a new trial of Petitioners' claims for actual pecuniary and nonpecuniary damages. *Id.*

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

The Fifth Circuit's reversal of Petitioners' pecuniary-loss award neither conflicted with the decisions of other

circuits nor misapplied Federal Rule of Evidence 703. The decision, rather, merely followed the well-settled principle that a jury verdict cannot stand if based solely on speculation and conjecture – even speculation and conjecture offered by a purported expert. The Court of Appeals correctly held that Petitioners' economist's opinion was not based on the record facts, and thus could not support a jury award of over $1.6 million.

The lower courts were entitled to, and properly did, set aside the punitive damages award because the record evidence did not satisfy Texas caselaw standards for such an award. The Court of Appeals was well within its discretion in ordering a new trial of both pecuniary and nonpecuniary damages. Petitioners have unsuccessfully attempted to conjure a Seventh Amendment violation out of these everyday exercises of judicial discretion.

ARGUMENT

I. The Fifth Circuit's Reversal of the Pecuniary Damages Award Was Consistent With The Law of Other Circuits and Correct on the Merits.

Petitioners, through selective and misleading citations, contend that the Fifth Circuit has adopted an interpretation of Rule 703 not followed in other circuits, and that the decision below would thus have been different if made by another Court of Appeals on the same facts. Petitioners are wrong. Like other circuits, the Fifth Circuit applies a limited and deferential standard of review to the *admission* of expert testimony; like other circuits, the Fifth Circuit will nevertheless give no weight to expert

testimony that is speculative and without factual support in the record. As other circuits have frequently done, the Fifth Circuit here correctly reversed a jury award based solely on such speculative testimony.

A. Fifth Circuit Caselaw Is Consistent With That of Other Courts

Rule 703 states that an expert's opinion is admissible even if based on inadmissible underlying data, so long as that data is "of a type reasonably relied on by experts in the field." Petitioners, at page 5 of their Petition, cite cases from the Third, Sixth, Seventh, and Tenth Circuits that restate this rule. Contrary to Petitioners' arguments, however, the Fifth Circuit has frequently applied the same principle. *See, e.g., Osburn v. Anchor Laboratories, Inc.*, 825 F.2d 908, 915 (5th Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S. Ct. 1476 (1988); *Bauman v. Centex Corp.*, 611 F.2d 1115, 1120 (5th Cir. 1980). In these and other cases, the Fifth Circuit has deferred to the trial court's ruling that an expert's testimony was based on facts reasonably relied on by other experts, and thus admissible.

At the same time, the Fifth Circuit has consistently held that an expert's opinion may not be based on mere speculation and conjecture if it is to provide any support for a jury's verdict. The Fifth Circuit cases cited by Petitioners at pages 6-7 of their Petition[4] hold no more than this. In *Marks* and *Eymard*, two wrongful-death cases, the

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[4] *Viterbo v. Dow Chemical Co.*, 826 F.2d 420 (5th Cir. 1987); *In re Air Crash (Eymard v. Pan American World Airways)*, 795 F.2d 1230 (5th Cir. 1986); *Marks v. Pan American World Airways*, 785 F.2d 539 (5th Cir. 1986).

court found that an economist had improperly projected lost-inheritance damages without any consideration of the actual circumstances of the surviving families. In *Viterbo,* the court affirmed a summary judgment for a product-liability defendant because the plaintiff's expert had pointed to no reliable record evidence to support his bald assertion that the defendant's product had caused plaintiff's illness.

Neither these cases nor the opinion below imposes a "subjective standard" (Petition, p. 7) on Rule 703, or purports to permit an appellate court to freely reevaluate an expert's credibility.[5] They merely point out the obvious: that an expert opinion is insufficient to support a verdict when it is "completely airborn, premised . . . on assumptions without basis in the real world of [the record]." *Eymard,* 795 F.2d at 1233; *see also Viterbo,* 826 F.2d at 422.

If, as Petitioners contend, the Fifth Circuit has somehow struck out on its own, one would expect to find conflicting decisions from other circuits upholding verdicts based on expert testimony without record support. The reported decisions, however, uniformly reject such evidence. Most notably, the Third Circuit, in two opinions issued after Petitioners' flagship *Japanese Products* case,[6]

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[5] Petitioners make much of Judge Higginbotham's critical commentary on expert testimony in *Eymard,* 795 F.2d at 1233-34. *See* Petition, pp. 6-7. Those observations were clearly dicta, and were not relied on as a basis for decision either in *Eymard* itself or in any subsequent Fifth Circuit case.

[6] *In re Japanese Electronic Products Antitrust Litigation,* 723 F.2d 238 (3rd Cir. 1983), *rev'd,* 475 U.S. 574 (1986).

has expressed disapproval of unsupported expert testimony. *Pennsylvania Dental Assn. v. Medical Service Assn.*, 745 F.2d 248, 262 (3rd Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985) ("the factual predicate of an expert's opinion must find some support in the record"); *American Bearing Co. v. Litton Industries, Inc.*, 729 F.2d 943, 949-50 at n. 14 (3rd Cir.), *cert. denied*, 469 U.S. 854 (1984) (even after *Japanese Products*, expert testimony must be based on more than "speculation and unfounded assumptions"). *See also Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666, 673 (D.C. Cir. 1977) (rejecting "expert" economic testimony based on "unsupported assumptions" and "theoretical speculations"); *Shu-Tao Lin v. McDonnell Douglas Corp.*, 742 F.2d 45, 48-49 (2d Cir. 1984) (same); *Drayton v. Jiffee Chemical Corp.*, 591 F.2d 352, 362-64 (6th Cir. 1978) (same); *United States v. Tranowski*, 659 F.2d 750 (7th Cir. 1981); *Lima v. United States*, 708 F.2d 502 (10th Cir. 1983).

Petitioners' real dispute is not with the Fifth Circuit's treatment of expert testimony, which is consistent with that of the other Courts of Appeals. Petitioners are unhappy that the Fifth Circuit, applying established law to the record facts, found that *their* economist's testimony was not grounded in the record and was thus insufficient to support the jury award. In short, Petitioners are asking this Court to find that the Fifth Circuit was wrong about the specific circumstances of this case. This Court, however, does "not grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *see also NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170, 176 n.8 (1981).

B. The Fifth Circuit Correctly Applied Texas Law Concerning Pecuniary Damages

In any case, the Fifth Circuit was correct on the merits. Petitioners' economist ignored the undisputed record evidence concerning Mr. Schwartz's earnings history. No evidence was presented of either the amount of money Mr. Schwartz had actually spent to support his family, or the amount they required for their daily necessities. The economist relied on only one objective fact, Mr. Schwartz's master's degree in agriculture – a degree which he then used to lump Mr. Schwartz in with doctors, lawyers, M.B.A.'s and all others with five or more years of college.

Under Texas law, "the pecuniary loss calculated on a projection into the future of the decedent's past earnings is the primary element of [wrongful death] awards and the awards should bear some ascertainable relation to the pecuniary benefit which the decedent's spouse or child might reasonably have expected to receive had the wrongful death not occurred." *Dover Corp. v. Perez*, 587 S.W.2d 761, 770 (Tex. Civ. App. 1979, writ ref'd n.r.e.) (citations omitted); *see Moorhead v. Mitsubishi Aircraft International, Inc.*, 828 F.2d 278, 290 (5th Cir. 1987); *Simpson v. United States*, 322 F.2d 688, 691 (5th Cir. 1963). The trial record is bereft of evidence that Joe Schwartz could, for forty years, have reasonably expected to provide his family with pecuniary benefits at the doctor/lawyer/M.B.A level reflected in the economist's statistics. The Court of Appeals properly vacated the jury's unsupported award for pecuniary losses of that magnitude.

II. Petitioners' Challenges to the Rulings Below on Punitive and Nonpecuniary Damages Pose No Seventh Amendment Issue, and Fail on Their Merits.

Petitioners have asked this Court to review two additional issues: the J.N.O.V. granted by the trial court, and affirmed by the Fifth Circuit, on the issue of exemplary damages; and the Fifth Circuit's decision to vacate the nonpecuniary damages awards and remand those for a new trial along with the pecuniary-loss award. Petitioners, no doubt realizing that this Court does not routinely review such case-specific rulings, have charged that the lower courts violated the Seventh Amendment by holding against them. Petitioners' position lacks even arguable merit.

A. Petitioners Have Not Raised A Colorable Seventh Amendment Claim

The Seventh Amendment prohibits the reexamination of jury-found facts other *"than according to the rules of the common law"* (emphasis added). The "rules of the common law" provide at least three ways that jury findings may be reexamined: through a directed verdict, a grant of judgment non obstante veredicto, and an order granting a new trial. This Court has long held that none of these procedures violates the Seventh Amendment. *Galloway v. United States*, 319 U.S. 372, 388-89 (1943) (directed verdict); *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 321-22 (1967) (J.N.O.V.); *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447-48 (1830) (new trial). *See Mattivi v. South African Marine Corp.*, 618 F.2d 163, 167 n. 3 (2d Cir. 1980) (argument that grant of a J.N.O.V. or directed verdict violates the Seventh Amendment "is frivolous").

Petitioners, in passing, admit as much when they argue that federal courts may not "redetermine facts found by a jury *on sufficient evidence.*" Petition at 9 (emphasis added).

Once again, Petitioners' true complaint is not that a constitutional or statutory violation has occurred, but that the courts below were merely wrong about whether the record evidence was sufficient to support their damages awards under Texas law. For example, as Petitioners' Petition makes clear, they are asking this Court to rule on whether the facts in this case satisfy the Texas standards for punitive damages set forth in *Burk Royalty Co. v. Walls*, 616 S.W. 2d 911 (Tex. 1981). Petition at 10-11. These complaints, like Petitioners' complaints about the reversal and remand of the pecuniary-loss award, are not appropriate for review by this Court. *United States v. Johnston*, 268 U.S. 220, 227 (1925).

B. The Rulings Below Were Correct

On the merits, the Court of Appeals was correct both in affirming the denial of punitive damages and in vacating and remanding the nonpecuniary damages award for retrial along with the pecuniary damage claims. With respect to punitive damages, Petitioners failed to adduce evidence that John Deere knew that cutoff switches were a practical and effective design alternative for corn combines, and consciously chose not to use them. Such knowledge and conscious choice are essential to a punitive-damages finding under *Burk Royalty. See Newding v. Kroger Co.*, 554 S.W.2d 15, 18 (Tex. Civ. App. 1977, no

writ) (mere failure to use safer design feature does not by itself establish gross negligence).

With respect to the remand for retrial of all damages, it is well-established that a court may not order a new trial limited to particular issues "unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931). *See, e.g., Atlantic Coast Line R. Co. v. Bennett*, 251 F.2d 934, 938-39 (4th Cir. 1958) (remanding for new trial of both compensatory and punitive damages, even though no error in compensatory award); *Nissho-Iwai Co. v. Occidental Crude Sales, Inc.*, 729 F.2d 1530, 1538-39 (5th Cir. 1984). The court below acted in accordance with this presumption in favor of a broad retrial.

CONCLUSION

Petitioners conclude their Petition with several misleading appeals to sympathy. They imply that the rulings below have caused them "a terrible loss", and expressly state that the courts below have "taken" their money . . . "with no explanation", and committed "injustice." Petitioners, though, have won a jury verdict that Respondents are liable for 70% of their losses, and will soon commence a retrial after which they will be awarded all the actual damages that they can prove through sufficient evidence. The rulings that Petitioners complain of merely kept Petitioners from recovering damages that they did not prove sufficiently. Petitioners have no legitimate basis

for arguing that those rulings conflict with any Constitutional or statutory provision, any Federal Rule, or any decision of a Court of Appeals. Moreover, those rulings are correct on the merits as a matter of state law. The Petition for Writ of Certiorari should therefore be denied.

Respectfully submitted,

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